INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	6
Conclusion	9
Appendix	10

CITATIONS

Cases:

Anderson v. *Commissioner*, 185 F. 2d 1021, certiorari denied, 341 U.S. 935	9
Batman v. *Commissioner*, 189 F. 2d 107, certiorari denied, 342 U.S. 877	9
Commissioner v. *Culbertson*, 337 U.S. 733	6, 7
Harkness v. *Commissioner*, 193 F. 2d 655, certiorari denied, 343 U.S. 945	9

Statutes:

Internal Revenue Code:

Sec. 11 (26 U.S.C. 1946 ed., Sec. 11)	10
Sec. 22 (26 U.S.C. 1946 ed., Sec. 22)	10
Sec. 181 (26 U.S.C. 1946 ed., Sec. 181)	10
Sec. 182 (26 U.S.C. 1946 ed., Sec. 182)	10
Sec. 3797 (26 U.S.C. 1946 ed., Sec. 3797)	11

Miscellaneous:

Treasury Regulations 111, Sec. 29.22(a)-1	11

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the Tax Court's determination that Delphia E. Maxwell did not intend to carry on business as a partner in the partnership conducted under the name of Lester Maxwell Furniture Company during the taxable years 1945 through 1947, and, therefore, that the share of the business income attributed to her as a partner during these years was includible in taxpayer's gross income as defined in Section 22(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and Regulations are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

The facts as stipulated and found by the Tax Court (R. 13a-20a) may be summarized as follows:

The taxpayer, Lester Maxwell, and his wife, Delphia E. Maxwell, are residents of Knoxville, Tennessee. (R. 13a.)

From 1919 to January 1, 1944, the taxpayer conducted a retail furniture business in Knoxville as a sole proprietorship. In 1929, he engaged his brother-in-law, Fred H. Human, to assist him in the business. In 1939 and various times thereafter, Human approached the taxpayer with respect to securing an interest in the business. In 1940, Marian M. Calloway, daughter of the taxpayer, and her husband, Hasson Calloway, urged her father to sell them an interest in the business. At the time, taxpayer was changing his business from a

secondary to a primary location, and he postponed making a decision about taking others into the business. (R. 14a.)

In the latter part of 1943, taxpayer decided to form a partnership with Human, Marian M. Calloway, and Hasson Calloway. Accordingly, a partnership agreement was executed on January 1, 1944, setting forth the following interest (R. 14a-15a):

Lester Maxwell	50 per cent
Fred H. Human	25 per cent
Hasson Calloway	12½ per cent
Marian Maxwell Calloway	12½ per cent

Human paid for his interest in the partnership by giving the taxpayer $4,000 in cash and a note for $14,015.26. Hasson Calloway and Marian M. Calloway each gave the taxpayer $2,000 in cash and an interest-bearing promissory note for $7,007.63 in payment for their interests. (R. 16a.)

The $4,000 in cash which the Calloways paid was obtained from the Hamilton National Bank of Knoxville on an unsecured note. The note was not endorsed by the taxpayer. The Calloways later paid the note to the bank and the two notes for $7,007.63 each, in installments. The last payment on the promissory notes given to the taxpayer was made on May 30, 1946. (R. 16a.)

Sometime after the formation of this partnership, Delphia E. Maxwell felt that she should have an interest in it and urged the taxpayer to sell her an interest. In the latter part of 1944, with the

consent of the other partners, the taxpayer sold her one-half of his then interest for the sum of $22,383.61. Delphia executed and delivered to the taxpayer a non-interest-bearing note, dated January 1, 1945, and payable in twelve months. On the back of the note are endorsements of payments totaling $12,000 as follows (R. 17a):

3/6/45	$3,000	9/15/48	$1,000
1/16/47	3,000	2/23/49	1,000
6/10/47	1,500	1/3/50	1,000
9/17/47	1,500		

Cancelled checks drawn by Delphia E. Maxwell and payable to Lester Maxwell show payments totaling $10,500 as follows (R. 17a):

1/16/46	$3,000	9/15/48	$1,000
6/10/47	1,500	2/24/49	1,000
8/11/47	1,500	1/3/50	1,000
9/17/47	1,500		

No explanation was offered with respect to the discrepancy in certain amounts and dates between the payments endorsed on the notes and the payments made by check. (R. 17a.)

An amendment to the "Articles of Partnership" was executed by the alleged partners on January 1, 1945, reflecting a reduction in Lester Maxwell's partnership interest to 25 per cent and Delphia Maxwell's acquisition of a 25 per cent interest. (R. 17a-18a.)

During the taxable period involved, no services were performed for the partnership by Delphia E.

Maxwell, Marian M. Calloway, or Hasson Calloway. Partnership returns were filed for the fiscal years ended September 30, 1944, to 1947, inclusive. (R. 18a.)

After deducting the partnership salaries paid to Lester Maxwell and Fred H. Human, as provided for under the terms of the partnership agreement dated January 1, 1944 (R. 15a), the amounts distributed to the members of the partnership during the taxable periods involved were as follows (R. 19a):

Distribution for Taxable Periods ended September 30.

Partner	*1944*	*1945*	*1946*	*1947*
Lester Maxwell	$24,949.56	$25,912.77	$21,521.04	$14,148.12
Delphia E. Maxwell		14,171.23	21,521.04	14,148.12
Fred H. Human	12,474.78	20,042.00	21,521.04	14,148.12
Hasson Calloway	6,237.39	10,021.00	10,760.52	7,074.07
Marian M. Calloway	6,237.39	10,021.00	10,760.52	7,074.06
Totals	$49,899.12	$80,168.00	$86,084.16	$56,592.49

Under the original and amended agreements, each of the partners had the right to control their respective shares of the income and during the taxable years involved each of the alleged partners withdrew all of their respective shares. The Calloways devoted such earning to their own independent use. (R. 19a.)

The Commissioner recognized that Lester Maxwell and Fred H. Human intended to carry on busi-

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 170

LESTER MAXWELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 13a-24a) are not reported. The opinion of the Court of Appeals (R. 33) is reported at 203 F. 2d 567.

JURISDICTION

The judgment of the Court of Appeals was entered on April 10, 1953. (R. 33.) The petition for a writ of certiorari was filed on July 9, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

ness as bona fide partners. However, the Commissioner determined that Marian M. Calloway, Hasson Calloway, and Delphia E. Maxwell were not bona fide partners for federal income tax purposes for the years 1945 through 1947, and that their shares of the partnership income were taxable to the taxpayer, and computed deficiencies accordingly. (R. 19a.)

The Tax Court, on the basis of all the evidence, found that all of the parties excepting Delphia E. Maxwell intended to join together in conducting the business as partners during the years in question. As for Delphia E. Maxwell, the Tax Court found that she was not a bona fide partner from 1945 through 1947 and, as to her, sustained the Commissioner's determination. The taxpayer appealed and the Court of Appeals affirmed. (R. 20a, 33.)

ARGUMENT

This case does not warrant further review. Contrary to the assertion of the taxpayer (Pet. 7), the decision of the Tax Court as affirmed by the Court of Appeals is not in conflict with this Court's decision in *Commissioner* v. *Culbertson,* 337 U. S. 733, and is clearly correct.

Taxpayer's contention that the Tax Court's decision is in conflict with that of this Court in *Commissioner* v. *Culbertson, supra,* rests on the premise that the Tax Court committed the same error in emphasis which was involved in the *Culbertson* case, *supra.* As he urged to the Court of Appeals, taxpayer maintains (Pet. 9) that the Tax Court

merely paid "lip service" to the *Culbertson* decision while considering the contribution of either "vital services" or "original capital" as essential to membership in a family partnership for tax purposes. It is, however, perfectly clear upon reviewing the findings of the Tax Court and reading its opinion as a whole that it addressed itself to the critical question (337 U.S. at 742) of whether "considering all the facts * * * the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." While in his petition (pp. 9-10) taxpayer points to isolated portions of the Tax Court's opinion as indicating a misapplication of *Culbertson, supra,* a reading of that language in its context refutes his contention. The Tax Court commenced its discussion as to whether Delphia E. Maxwell was a partner for tax purposes by stating the issue as being whether "Delphia E. Maxwell, wife of Lester Maxwell, was a bona fide partner during the taxable years 1945 to 1947, inclusive." (R. 22a.) It then touched on the various guides furnished by this Court in *Commissioner* v. *Culbertson,* 337 U.S. at 742), to the determination of their true intentions. These included: the circumstances relative to her purchasing an interest in the partnership;* her failure to contribute services; the lack of evidence as to her ever having partici-

* There is no basis in the Tax Court's findings of fact or opinion for the taxpayer's statement that the court held that Delphia E. Maxwell did not contribute capital to the partnership on the theory that buying an existing partnership interest does not make the purchaser a partner. (Pet. 11.) Re-

pated in the management or policy-making of the business; the fact that her testimony did not deny the implication that the income she received was used for the benefit of herself and the taxpayer; and the fact that the record is silent as to any business purpose having been served by her admission to the partnership. (R. 22a-23a.) In summation, the Tax Court said (R. 23a) that "Giving due consideration to all the relevant factors throwing light upon the true intention of the parties, * * *" it found that taxpayer's wife Delphia was not a "bona fide partner, for Federal tax purposes, in the partnership business conducted under the name of Lester Maxwell Furniture Company." Read in its entirety, the Tax Court's opinion contains no indication that, as the taxpayer contends (Pet. 8), it based its decision "on so-called 'objective tests' which resulted from misinterpretation of this Court's decisions in *Commissioner* v. *Tower,* 327 U.S. 280, and *Lusthaus* v. *Commissioner,* 327 U.S. 293."

Moreover, there is no more occasion for further review of this case than of other family partnership cases in which the Courts of Appeals have concurred in the Tax Court's findings of fact that the parties did not intend to carry on business as part-

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ferring to the fact that Delphia had given the taxpayer her note in exchange for one half of his then partnership interest, the Tax Court said (R. 23a):

> The partnership capital was not increased by such transaction. No contribution of independent capital originating with Delphia E. Maxwell resulted from the note transaction. * * *

ners during the taxable year, and in which this Court has denied certiorari. See e.g., *Anderson* v. *Commissioner,* 185 F. 2d 1021 (C.A. 2d), certiorari denied, 341 U.S. 935; *Batman* v. *Commissioner,* 189 F. 2d 107 (C.A. 5th), certiorari denied, 342 U.S. 877; cf. *Harkness* v. *Commissioner,* 193 F. 2d 655 (C.A. 9th), certiorari denied, 343 U.S. 945.

CONCLUSION

The decision below is correct and there is no occasion for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1953.

APPENDIX

Internal Revenue Code:

Sec. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a * * * tax * * *.

(26 U.S.C. 1946 ed., Sec. 11.)

Sec. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U.S.C. 1946 ed., Sec. 22.)

Sec. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1946 ed., Sec. 181.)

Sec. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1946 ed., Sec. 182.)

Sec. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(2) *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3797.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.22(a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax

by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, * * *.

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